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Special interrogatory retains its important role in litigation

An adage that most lawyers know is, “If you don’t know the answer, do not ask the question.”

There is a time at trial, however, when a lawyer must ask one or more questions, the answers to which neither the lawyer nor anyone involved in the case knows. Those questions, put to the jurors deciding the case, are special interrogatories.

The special interrogatory poses a single, direct question on an ultimate issue of fact upon which the determination of the case depends. *Simmons v. Garcés*, 198 Ill. 2d 541, 556 (2002). The question should not be misleading or confusing, and where possible, it should use the same language or terms as the tendered instructions. *Smart v. City of Chicago*, 2013 IL App (1st) 120901, ¶ 32. A special interrogatory guards the integrity of the general verdict by testing it against the jury’s determination as to one or more specific issues of ultimate fact. *Simmons*, 198 Ill. 2d at 556.

In civil trials conducted prior to Jan. 1, 2020, requests by the parties to submit special interrogatories to the jury were commonplace. The statute governing special interrogatories provided, in pertinent part, as follows:

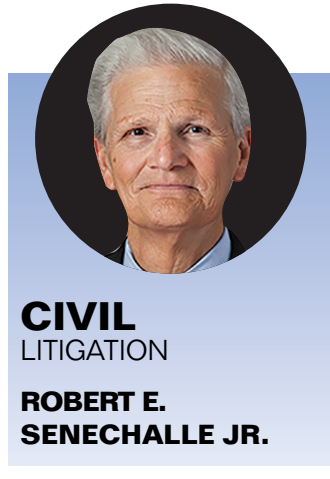
“The jury may be required by the court, and must on

request of any party, to find specially on any material question or questions of fact submitted to the jury in writing Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly.” 735 ILCS 5/2-1108.

Key components of the statute were (a) that the court was required to submit a properly framed special interrogatory to the jury and (b) that a factual finding made in an answer to a special interrogatory, to the extent it was inconsistent with the general verdict, controlled the verdict. In such an instance, the court would enter judgment consistent with the jury’s factual finding in its answer to the special interrogatory.

There are numerous reported Illinois cases where a jury’s answer to a special interrogatory was contradictory to the general verdict, resulting in the verdict being replaced by a judgment in conformity with the jury’s special finding.

The legislature’s recent amendment to the special interrogatory statute, however, made three significant



CIVIL LITIGATION

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changes: First, the word “must” was removed and replaced with the words “within the discretion of the court.” Second, when a special interrogatory answer is inconsistent with the general verdict, judgment is not entered on the general verdict. Instead, the statute now states that “the court shall direct the jury to further consider its answers and verdict.” Lastly, in closing argument, the parties are allowed to explain to the jury what may result if the general verdict is inconsistent with any special finding.

Several articles written after the revised statute became law warned of the special interrogatory’s demise. In more than 25 jury cases tried before me since the statute was amended, the decrease in the use of special interrogatories suggests some validity to these predictions. Hopefully, the trend will be short lived.

Despite the statutory changes, using a special interrogatory in an appropriate situation continues to make sound trial strategy. The amendments made in 2020, applicable to cases tried after Jan. 1, 2020, do not reduce the importance to defendants and plaintiffs of testing the general verdict with a special interrogatory.

Special interrogatories are particularly important in close factual cases where sympathies strongly favor one side or the other. Twelve jurors may be willing to sign a general verdict finding in favor of the plaintiff and awarding damages, but in a closely balanced case, those same jurors may be unwilling to state in writing that the defendant committed the alleged negligent or reckless act or caused the plaintiff’s injury. The wealth of case law where general verdicts are contradicted by a jury’s answer to a special interrogatory proves the point.

There is no downside to submitting a question to the jury that tests the general verdict. The upside remains significant. Although the prize of automatic judgment on the special interrogatory is no longer available, requiring the jury to make the special finding continues to have multiple benefits.

First, the presence of the singular factual question focuses the jury's attention on a key issue in the case. It forces each of the jurors to answer an ultimate question of fact upon which the rights of one of the parties to a verdict depends.

Second, it prevents a judgment from being entered when all 12 jurors did not find that the evidence supported the general verdict. The only way to know whether all 12 jurors agree

that each of the elements of a party's case has been proven is to specifically ask them in one or more special interrogatories.

As the revised statute now requires, further deliberations in the face of an inconsistent general verdict will result in either the return of a verdict consistent with the interrogatory answer or a deadlocked jury and a new trial. Either way, no general verdict will be entered without being tested by the special interrogatory.

As to the statutory amendment from "must" to "within the discretion of the court," that revision is unlikely to yield significant practical change. Courts historically exercised their discretion in deciding whether the special interrogatory was in proper form and supported by the

evidence. It remains to be seen whether appellate review of a trial court's decision will be materially different after the amendment. That concern, however, should not cause a litigant to withhold the request for a special interrogatory in an appropriate case.

There remains every reason for both defendants and plaintiffs to continue to tender special interrogatories to test a general verdict on dispositive factual issues. Those requests for a special finding could address issues of proximate cause, an alleged act of negligence, or breach or performance of contract, to name only a few.

The special interrogatory can also enable the appellate court to determine whether a challenged evidentiary ruling at trial or the giving of a

particular jury instruction affected the jury's general verdict. See, for example, *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 289-90 (1st Dist. 2009), where the absence of a special interrogatory prevented the appellate court from deciding whether the giving of an arguably improper affirmative defense instruction of contributory negligence influenced the jury's general verdict for the defendant.

The special interrogatory remains alive and important in Illinois civil jury trials. Case law in the years ahead will determine the practical effect of the statutory amendment. In the meantime, the wisdom of continuing to employ this important tool in the jury instruction process remains unchanged.